DEC 13 1999

(10)

No. 99-138

Supreme Court, U.S.
FILED
DEC 13 1999
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In The

SUPREME COURT OF THE UNITED STATES

In the Matter of the Visitation of NATALIE ANNE TROXEL AND ISABELLE ROSE TROXEL, Minors.
JENIFER AND GARY TROXEL,

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR RESPONDENTS

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RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the State may order visitation with "any person" "at any time," without proof that an indisputably fit custodial parent is not acting in her child's best interest, based on the standardless exercise of a judge's discretion.

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STATUTORY PROVISIONS INVOLVED

The court may order visitation rights for a person other than a parent when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

A person other than a parent may petition the court for visitation rights at any time.

The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child.

Former RCW 26.09.240.

Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

RCW 26.10.160(3).

STATEMENT OF THE CASE

Petitioners ask this Court to overturn the Washington Supreme Court's interpretation of Washington legislation without discussing a single Washington case or a single Washington statute. This statement first explains the law that governs child custody and visitation in Washington. It then sets out the facts of this and the other two cases that the court considered below. Only with these facts in mind can this Court appreciate why the Washington Supreme Court struck down Washington's third party visitation statutes.

A. The Statutes And Case Law Governing Third Party Visitation Actions In Washington.

1. The Third Party Visitation Statutes Predate The Washington Parenting Act.

The regulation of domestic relations in Washington is wholly statutory. *Goade v. Goade*, 20 Wn.2d 19, 145 P.2d 886, 887 (1944). The third party visitation statutes at issue in this case, RCW 26.10.160 and former RCW 26.09.240, were originally enacted as part of the Dissolution Act of 1973. Thirteen years ago, the Washington Legislature profoundly altered the law governing custody of children. In the Parenting Act of 1987, Washington abandoned the concept of custody and visitation and adopted the principle of parenting plans. Under the Washington parenting plan scheme, the parent's residential time with the children is determined by weighing seven enumerated factors to encourage a "loving, stable, and nurturing relationship." RCW 26.09.187(3)(a). Decisionmaking is separately allocated, and does not depend upon with which parent the child primarily resides, as the parents often jointly make decisions concerning education, health care, religious training, and other major issues. RCW 26.09.184(4). The Parenting Act applies to unmarried parents pursuant to RCW 26.26.130(7).

The Washington Parenting Act is based on the concept that parents should retain maximum autonomy in childrearing even though the adults' relationship has ended:

> Parents have the responsibility to make decisions and perform other parental functions necessary for the care and growth of their minor children . . . . The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child . . .

RCW 26.09.002. Under the Parenting Act, state-imposed restrictions on a parent's conduct are authorized only under limited, expressly enumerated circumstances, when the detrimental effect of the parents' conduct on the child has been proved by the party seeking the restriction. RCW 26.09.191. Washington has been especially careful to limit the courts' authority to dictate a parent's behavior when constitutional interests may be implicated. *See, e.g., Marriage of Littlefield*, 133 Wn.2d 39, 940 P.2d 136 (1997).

One of the statutes at issue here, RCW 26.09.240, was extensively revised in 1996. Wash. Laws 1996, ch. 177, §1. The statute was amended to allow consideration of a petition for third party visitation only if an action concerning the parenting of children is pending between parents. RCW 26.09.240(1). Under the new statute, a petitioner must as an initial matter prove by clear and convincing evidence a "significant relationship" with the child. RCW 26.09.240(3). The statute then sets out eight factors to be examined in considering a request for third party visitation, provides for mediation in certain circumstances, and requires that any third party visitation provisions be incorporated into the parenting plan. RCW 26.09.240(5)(b),(6),(9).

The language of this new statute is reproduced in Appendix E to petitioners' brief. The brief of the Washington Attorney General and others as amici is directed to this statute. However, the Washington Supreme Court's decision at issue here does not address the application of this new statute, as each of the cases before it arose under former RCW 26.09.240 or under RCW 26.10.160(3).

Petitioners allude to the wisdom of family courts in "orchestrating" "non-coercive resolution" of third party visitation disputes with the aid of a court-appointed expert or

institutionalized mediation.[1] (Pet. Br. at 17-18) This characterization does not reflect the reality in Washington state. As an example, there is no specialized "family court" in Washington state. Domestic relations disputes are handled by the county superior courts of general jurisdiction, along with felonies, contract and tort disputes for amounts exceeding $3,000, and claims for equitable relief. Wash. Const. Art. 4, § 6; RCW 26.12.010. Moreover, as in this case, most domestic relations motions are heard not by judges, but by court commissioners - private attorneys retained at the will of the elected superior court judges of the county - on the basis of affidavits submitted by the opposing parties and 5- to 10-minute arguments by their attorneys. *See* RCW 26.12.050(1)(a), (3). And although the investigative and advisory services offered up by petitioners as palliatives for adversarial proceedings are available, at a price, access is hardly automatic, and is extremely limited in many of the smaller counties of the state, such as the county where this dispute arose. Office of Attorney General of Washington, *Alternative Dispute Resolution in Washington* (1999). (RA 31-42)

2. Washington Courts Consistently Interpreted Third Party Visitation Statutes To Apply Only When There Was A Pending Action For Custody.

When the Parenting Act was enacted in 1987, "the law relating to third-party actions involving custody of minor children" was re-enacted and codified in RCW ch. 26.10. RCW

[1] Petitioners' use of the word "solomonic" in their idyllic characterization of the role of family courts in third party visitation litigation is particularly inapt. King Solomon did not "split the baby" to accommodate the claim of the petitioning non-parent, whose own son had died. Instead, King Solomon acknowledged the true mother's right to the exclusive care of her infant. 1 Kings 3:16-28.

26.10.010. Third party visitation language was incorporated in both former RCW 26.09.240 and in subsection (3) of new RCW 26.10.160. In their reference to "visitation," the statutes became in some ways an anachronism. The vestige was of little consequence, however, as the Washington courts had consistently interpreted the statute to require the existence of a pending custody action before visitation with third parties could be ordered. *See, e.g., Custody of B.S.Z.-S.*, 74 Wn. App. 727, 875 P.2d 693, 696 (1994) ("In contrast to other jurisdictions, Washington does not statutorily recognize the rights of grandparents to visitation . . .").

The Washington courts had first held that grandparents had no standing to bring an independent visitation action three years after the original enactment of the third party visitation statute, in *Carlson v. Carlson*, 16 Wn. App. 595, 558 P.2d 836 (1976). The *Carlson* court also rejected the grandparent's claim to a common law "right" to visitation. 558 P.2d at 837. The *Carlson* court relied on five policy considerations:

> (1) Ordinarily the parent's obligation to allow the grandparent to visit the child is moral, and not legal.
>
> (2) The judicial enforcement of grandparent visitation rights would divide proper parental authority, thereby hindering it.
>
> (3) The best interests of the child are not furthered by forcing the child into the midst of a conflict of authority and ill feelings between the parent and grandparent.
>
> (4) Where there is a conflict as between grandparent and parent, the parent alone should be the judge, without having to account to anyone for the motives in denying the grandparent visitation.

> (5) The ties of nature are the only efficacious means of restoring normal family relations and not the coercive measures which follow judicial intervention.

Carlson, 558 P.2d at 837-38.

Over the next 20 years, the Washington courts continued to rebuff any attempt to use the statute to justify independent third party visitation actions. *Custody of Thompson*, 34 Wn. App. 643, 663 P.2d 164, 166 (1983); *Mitchell v. Doe*, 41 Wn. App. 846, 706 P.2d 1100, 1102 (1985); *Bond v. Yount*, 47 Wn. App. 181, 734 P.2d 39 (1987). In the face of these limitations, the Legislature and the citizens of the state of Washington consistently refused to enact legislation giving grandparents a special statutory basis for an independent visitation action. For instance, legislation proposed in 1982 would have created a presumption that visitation with a grandparent should be ordered and allowed a grandparent to petition for visitation on the death of a child's parent. House Bill 1049, 48th Legis. (Wash. 1982) (RA 4). The bill died in committee. *See Custody of Thompson*, 663 P.2d at 166 n.3. A bill and an initiative to the people that would have created special independent visitation rights for grandparents failed in 1997. House Bill 1973, 55th Legis. (Wash. 1997); Initiative 672 (RA 6-8). *See Visitation of Troxel*, 87 Wn. App. 131, 940 P.2d 698, 701 (1997) (Grosse, J., concurring).

3. The Washington Supreme Court's Decision Was Based On The Statutes' Application In The Three Cases Before It.

It was in the context of this statutory and case law that the Washington Supreme Court declared that the third party visitation statutes at issue in this case were unconstitutional as

applied in *Smith*, *Troxel*, and *Wolcott* - the three consolidated cases before the Court.[2]

The petitioners' assumption that the "court below properly dealt with this case as presenting only a facial challenge to the constitutionality of the Washington statute" (Pet. Br. at 19) is not supported by the record. The parents whose cases were before the Washington Supreme Court sought to maintain the requirement that there be a custody action pending before a third party could seek visitation. (*Smith* App. Br. at 8-13; *Troxel* Ans. at 7-10) The parents also argued that, in order to protect their interests in parental autonomy from undue state interference, and consistent with state case law governing other restrictions on a parent's conduct, the state court should require a showing of harm or detriment to a child before third party visitation could be ordered by a court. (*Smith* Rep. at 10-11; *Troxel* Ans. at 6, 17)

The parents argued that once the statutes were interpreted in this manner, the visitation orders entered in *Troxel* and *Smith* must be reversed and the dismissal of the *Wolcott* action must be affirmed because *in these specific cases* (1) there was no pending action, and (2) there was no finding that the parent was not acting in the child's best interest as the Washington Supreme Court interprets that term in this context.

The Washington Supreme Court determined that it could not construe the plain language of the statutes as the parents urged. (Pet. 11a) But the Court agreed that a parent's liberty interest in making decisions concerning her child's upbringing may not be infringed absent a showing of harm - that is, a showing that the parent is *not* in fact acting in the child's best interest. (Pet. 21a) It therefore held that the action in *Wolcott*

---

[2] *Custody of Smith*, No. 66207-0; *Visitation of Wolcott*, No. 65699-1; *Troxel v. Granville*, No. 65605-3.

was properly dismissed and that the visitation orders in *Troxel* and *Smith* must be reversed.

The facts in each of these cases provide further understanding of the reasons for the Washington Supreme Court's decision:

B. *Troxel v. Granville.*

1. Tommie Granville Asked The Troxels To Limit Their Visits To Once A Month.

Brad Troxel and Tommie Granville lived together sporadically beginning in January 1989. Tommie was recently separated, and the primary caregiver of three children born of her marriage. Tommie bore Brad's daughter, Natalie, on November 1, 1989. Tommie broke up with Brad in June 1991, when she was three months pregnant with their second child, Isabelle Rose Troxel, born on December 24, 1991. (CP 34)[3]

It is undisputed Tommie was the primary caregiver for the children. The parties dispute how often Brad saw the children while he was alive. Brad's parents undoubtedly had some contact with the children, as Brad was living in their home when he committed suicide on May 13, 1993. (CP 34)

For several weeks after his death, Brad's siblings provided daycare once a week while Tommie was at work. (RP 41-42;

[3] References to the record before the Washington Supreme Court follow Washington citation practice. References to pleadings contained in the Clerk's Papers are cited CP __. References to transcribed reports of proceedings in open court are cited RP __. Citations are also provided to materials contained in the appendices before this Court in the Petition for Writ of Certiorari (Pet. __), Joint Appendix (JA __), and Lodged Appendix of Respondent (RA __).

CP 74-75) Although she had had no direct contact with Brad's parents, Gary and Jenifer Troxel, since Brad's death, Tommie became aware that they were seeing the girls while Brad's sister cared for them. She encouraged Brad's sister to tell his parents that they were welcome to visit with Natalie and Isabelle. (CP 34)

As the summer advanced Tommie became concerned about the Troxel family's increasing, spur-of-the-moment requests to see Natalie and Isabelle. In October 1993, Tommie spoke with Jenifer Troxel. Tommie asked the Troxels to respect her efforts to nurture her new blended family with Kelly Wynn, a local business owner with two children from a previous marriage. Tommie suggested that the Troxels see Natalie and Isabelle one weekend day a month. Tommie proposed that Jenifer arrange contact with the rest of the Troxel extended family during those visits. (CP 34-35, 98)

Tommie proposed this schedule as a starting point, until Kelly and she had the opportunity to stabilize their new blended family. Tommie never acted to cut off access to the girls by the Troxels, nor did Tommie suggest in any way that she would. (CP 35-36)

2. The Troxels Sued Tommie, Demanding Court-Ordered Overnight Visitation Twice A Month.

Jenifer and Gary Troxel were unhappy with Tommie's decision. The Troxels sued Tommie in Skagit County Superior Court, seeking overnight visits "every other weekend, reasonable time on holidays and school vacations, especially Thanksgiving weekend, the Christmas holidays, Easter weekend and summer vacation time." (CP 5)

The Troxels' motion for court-ordered visitation pending trial was heard on a family law motions calendar. In her

responsive affidavits, Tommie explained that she did not want to eliminate contact with the Troxels, but that she was concerned that the Troxels saw Natalie and Isabelle as a "substitute" for their son Brad. (CP 21-23) A court commissioner ordered that the Troxels have visitation once a month pending trial. (JA 21a) Through 1994, the Wynns continued to provide visitation to the Troxels whenever they asked. These visits with Natalie and Isabelle, then ages 2 and 4, were without parental supervision.

Natalie in particular was often upset after her time with the Troxels. (CP 82-84) Nevertheless, as their lawsuit approached trial in December 1994, the Troxels continued to seek biweekly, overnight visitation and extended summer and holiday vacation time with the toddlers. (CP 54-56)

3. The Superior Court Ordered Visitation And Directed Tommie To Consult With The Troxels.

A trial was held in December 1994. As she wanted, if possible, to allow her children by Brad to maintain a relationship with the Troxel family, Tommie was reluctant to raise all her concerns regarding the Troxels. But Tommie continued to resist being ordered to provide visits. Tommie described her blended extended family to the judge.[4] (RP 194-96, JA 57a-59a) Two therapists who had observed the girls testified that the visitation requested by the Troxels in their petition could be harmful to the children. (RP 88-90, JA 40a-42a; RP 141-42)

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[4] Kelly Wynn adopted Natalie and Isabelle on October 28, 1996. (CP 132-37; JA 60a-67a) The Wynns now have eight children. Tommie and Kelly's daughter was seven months old at the time of trial. (RP 194; JA 57a) She is now five. Natalie is ten and Isabelle will be eight when this case is considered by the Court. Besides the Troxels, Tommie identified four sets of grandparents, with whom the Wynns maintained monthly contact. (RP 196; JA 59a)

The judge announced his decision immediately. There is no indication in the court's oral ruling, or in either of the implementation orders, that he believed the Troxels to have any particular burden in establishing the children's best interests: "I think it would be in the best interest of the children and I haven't been shown it is not in the best interest of the children." (RP 214) The judge simply expressed, and entered an order imposing, his view that visitation once a month would be in the children's interests. Unlike the toddlers' mother, the judge believed overnight visits were appropriate. He consequently ordered that visitation be from Saturday at 4:30 p.m. until Sunday at 6:00 p.m. (RP 218)

The Troxels' attorney prepared a visitation order incorporating the court's oral decision. Although it recites that findings of fact and conclusions of law had been entered, the order was not in fact supported by any findings or conclusions. (CP 124, Pet. 77a) In addition to the visitation ordered in the court's oral opinion, the order required Tommie to provide the Troxels with notice of the girls' school and extra-curricular events, and to consult with the Troxels before discussing with her children the circumstances of their biological father's death. (CP 125, Pet. 78a)

Orders providing for visitation or residential time with a child have serious consequences in Washington state. Violation of this order could have subjected Tommie Granville Wynn to sanctions for contempt, including the possibility of coercive or punitive jail time, and to a civil action for damages, including fees incurred for attorneys and "investigative services." RCW 26.09.160(2)(a), .255; RCW 26.10.180. Violation of an order entered under these statutes can be prosecuted as a felony. RCW 9A.40.060(2)(a), .070(2),(3).

Given their willingness to arrange visits with the Troxels voluntarily, Tommie Granville Wynn and her husband Kelly

Wynn were astonished by the court's order. They were particularly concerned about the possibility for continued, unpredictable interference with their parenting decisions and family life by the Troxels, as RCW 26.10.160(3) provides that a new visitation order could be entered "at any time" "whether or not there has been any change of circumstances."[5]

Tommie appealed the visitation order to the intermediate appellate court. (JA 7a) After the Court of Appeals entered an order directing entry of findings (JA 9a), the trial court entered findings and modified the scheduling provisions on January 3, 1996. (CP 127-31, JA 68a-74a) As with the original order, the findings gave no deference to Tommie's assessment of the children's best interest. There is no finding that the Troxels had met any burden to establish the children's best interest. The findings recite as a basis for the imposition of visitation and other orders, the observation that the Troxels could provide the children with "cousins and music." (CP 128, JA 70a)

On July 28, 1997, the Court of Appeals reversed the visitation order, holding that the Troxels lacked standing to petition for visitation independent of a pending custody proceeding. 87 Wn. App. 131, 940 P.2d 698 (1997) (Pet. 55a-71a).

C. *Visitation of Wolcott.*

Four months before the *Troxel* ruling, the Court of Appeals had issued a similar decision in *Visitation of Wolcott*. In *Wolcott*, a man commenced a petition for visitation rights with

[5] This is in contrast to the statutes governing disputes between parents, where there is a very high threshold requirement of a substantial change of circumstances and, with limited exceptions, a parenting plan may be modified only to prevent harm to the child. RCW 26.09.260.

a child 18 months after he and the mother broke up. In November 1993, a Snohomish County superior court commissioner and judge rejected the mother's claim that the ex-boyfriend did not have standing, and ordered temporary visitation. (*Wolcott* CP 108, 119-20) The Court of Appeals rejected the mother's request for interlocutory review. A second superior court judge granted the ex-boyfriend's motion to strike the mother's subsequent motion for summary judgment, declaratory judgment, and to terminate visitation. (CP 49-51) When the matter finally came on for trial in October 1995 before yet a third judge, the court dismissed the petition for visitation on the ground that the ex-boyfriend did not have standing to seek visitation. (CP 8-12) The Court of Appeals affirmed the dismissal. 85 Wn. App. 468, 933 P.2d 1066 (1997).

D. *Custody of Smith.*

At the same time, another appeal of a third party visitation order was pending in the Court of Appeals. Appellant Kelly Stillwell's mother and her estranged husband Brian Smith had killed one another in a gun battle. Five weeks to the day after the homicides, Brian Smith's parents and siblings sued Kelly Stillwell in Island County Superior Court to compel visitation with her 3-year-old daughter Sara.[6] (*Smith* CP 51) The elder Smiths, who lived in Ohio, sought 60 days visitation each year. Brian's siblings, who lived in California and Michigan, asked the court to order 14 days visitation each year with each of them. (CP 52-55)

The *Smith* case had been tried to Judge Pro Tempore Tim Martin. (CP 3) Mr. Martin heard evidence that Brian's parents had visited with Sara six times in the 19 months between Sara's

[6] Brian Smith was not the biological father of Sara, who had been conceived by artificial insemination with donor sperm. (CP 4)

birth and Kelly and Brian's separation, and on five occasions thereafter. Brian's brother had visited with Sara four times, and his sister once, before the separation, but by choice neither had visited with Sara in the 27 months since. (CP 6, RCP 80-94)

Mr. Martin concluded that it would be in Sara's best interest to "resume contact" with the Smiths. (CP 6-7) An order was entered for three weeks unsupervised visitation annually with the Smiths, including two continuous weeks each summer. (CP 12-13) The 10-page order also established guidelines for gifts and phone calls, ordered Kelly Stillwell to provide to the Smiths a written "list of reasonable parenting rules," and appointed a "visitation facilitator," whose services Kelly Stillwell was ordered to partially pay. (CP 15-19) As was true for Tommie Granville Wynn, if Kelly Stillwell failed to comply with the visitation order she was subject to the coercive and penal consequences identified in § B.3, *supra* at 11.

E. Decision On Review.

The ex-boyfriend in *Wolcott* petitioned for discretionary review to the Washington Supreme Court. The Troxels also petitioned for review, although they concede that they continued to enjoy regular visits with Natalie and Isabelle after the Court of Appeals reversed the visitation order. (Pet. Br. at 6) The collateral relatives in *Smith* asked the Washington Supreme Court to accept direct review of Kelly Stillwell's appeal.

The Supreme Court consolidated all three cases and heard argument in April 1998. On December 24, 1998, the Washington Supreme Court held former RCW 26.09.240 and RCW 26.10.160(3) unconstitutional as applied because the statutes violated the protection that the Constitution affords to family autonomy and intimate associations except in certain narrow circumstances that the Washington Supreme Court

recognized as permitting court intervention. *Custody of Smith*, 137 Wn.2d 1, 969 P.2d 21 (1998) (Pet. 1a-54a).

SUMMARY OF ARGUMENT

The issue before this Court is significantly narrower than, and fundamentally different from, that posed by petitioners. The Washington legislation at issue is not a grandparent visitation statute, much less one that limits the circumstances under which a grandparent can seek visitation to those in which a strong and demonstrable state interest can be identified. Instead, the Washington Supreme Court considered the constitutionality of a statute that allowed "any person" to invoke the power of the courts to order visitation with a child "at any time," and that authorized a court to order visitation whenever it believed that it "may serve the best interest of the child."

Respondent argued below that being forced to defend an action for visitation pursuant to such a statute, and having the state's opinion of what is best for her children substituted for her own - with no presumption that she was acting in her children's best interest, and with no factors to guide the exercise of the court's discretion - violated her family's constitutionally protected interests in privacy, autonomy and association. Even if this Court considers this to be an overbreadth challenge, respondent's standing to challenge these state statutes on this ground in the state's highest court is a matter of state, not federal, law.

At issue in this case is the fundamental right of respondent and other parents to family autonomy, the oldest and one of the most sacred of our personal liberties. Seen against this right and its historical basis, "best interest" - undefined and standardless in the statutes at issue here - is no test at all for deciding claims of a grandparent or other third party to court-

ordered visitation. It does not further a compelling state interest that justifies overriding a parent's childrearing decision. Both the courts of Washington and this Court have in fact consistently limited the use of the state's *parens patriae* power - the interest in children's wellbeing that would justify state intervention in parental decisionmaking - to circumstances in which a child is being detrimentally affected in a very significant way. The statutes at issue are not narrowly tailored to meet the state's interest, as they lack standards for determining both by whom and when such an action can be brought and what must be proven before visitation can be ordered.

The "significant impairment" test suggested by the petitioners has been rejected by a majority of this Court. It is especially inappropriate here, because the government lacks a significant interest in imposing the will of third parties over that of parents in visitation disputes except in the most extraordinary circumstances. This test has been limited to cases in which the Court must weigh a fundamental right against an equally compelling government interest, or when state action only indirectly affects the exercise of a fundamental right. It cannot be used here, where petitioners themselves concede there is no inherent right to grandparent visitation and the burden of litigating these childrearing issues is not only direct, but deadly to, exercise of the family's right to autonomy. In any event, the way in which third party visitation orders necessarily go far beyond scheduling visits, to micro-management of the family lives of the disputants, constitutes a significant impairment of the protected right.

The remedy chosen by the Washington Supreme Court when confronted with three lawsuits that graphically demonstrated the inadequacies of Washington's third party visitation scheme was a powerful one. The choice of what to do with these vague and overbroad statutes may be an issue of separation of power between the legislative and judicial

branches of government in the state of Washington, but it is not a matter that implicates federal law. Rather, it is an issue of state law, in which Washington state may fashion the remedy it considers necessary to insure the constitutional application of its statutes regardless of the constraints a federal court might choose to impose on its own consideration of such a statute.

ARGUMENT

A. This Court Cannot Restrict The Washington Supreme Court's Ability To Consider The Constitutionality Of A Standardless State Statute.

The Washington Supreme Court held RCW 26.10.160(3) and former RCW 26.09.240 unconstitutional for two reasons: (1) the statutes do not properly limit either the individuals who can seek third party visitation or the circumstances under which third party visitation can be sought; and (2) the statutes do not place on individuals seeking visitation a burden of proving that the parent's decision is not in a child's best interest - that is, that it would harm the child. This was not a ruling that the statutes are facially overbroad. Even if it was, petitioners cannot ask this Court to restrict the ability of a state's highest court to entertain a facial challenge based on principles of standing and statutory construction that are purely a function of state law.

Limits imposed by this Court on facial challenges do not apply where the constitutional infirmity is not just that a law may be applied to protected conduct, but that a standardless decisionmaking process undermines constitutionally protected interests. *See City of Chicago v. Morales*, __ U.S. __, 119 S. Ct. 1849, 1866 (1999) (Breyer, J., concurring) ("if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance *is* invalid in all its applications") (emphasis in original); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). Respondent has standing to assert that she

had the right to be judged by a rule of law that safeguards her family's constitutionally protected rights.

Even were this a facial challenge, the restrictive tests relied upon by petitioners, and the principles of federalism and separation of powers from which they derive, do not apply where a state's highest court has decided to entertain an overbreadth challenge to a state law. The limitations that this Court imposes on its own power to consider the unconstitutional applications of a statute are grounded in the federal courts' discretionary limitations on standing:

> When asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question. In this sense, the threshold for facial challenges is a species of third party (*jus tertii*) standing, which we have recognized as a prudential doctrine and not one mandated by Article III of the Constitution.

Morales, 119 S. Ct. at 1858-59 n.22 (plurality opinion). These "prudential" limitations have no application and "would serve no functional purpose" where a state court has chosen to reach the merits of a constitutional claim. 119 S. Ct. at 1858-59 n.22, *quoting City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 243 (1983).

There is no merit to petitioners' argument that this Court must now hold respondent to the standing requirements applicable either on review of federal court challenges to federal statutes, *e.g.*, *United States v. Salerno*, 481 U.S. 739, 745 (1987), or to state statutes, *e.g.*, *Los Angeles Police Dept. v. United Reporting Pub. Corp.*, No. 98-678 (12/7/99). More particularly, petitioners' contention that a facial challenge to Washington's third party visitation statutes "would face insurmountable jurisdictional problems under Article III['s]"

requirement of a case or controversy (Pet. Br. at 21) is irrelevant in this case, which was litigated entirely in the state courts. The Washington court is free to adopt different rules of standing to mount a constitutional challenge of a state statute than those applied by this Court.

Equally specious is petitioners' argument that this Court should refrain from considering the due process deficiencies inherent in these overbroad statutes on the hope that the state court might construe RCW 26.10.160(3) to avoid "possible constitutional problems." (Pet. Br. at 20 n.39) The state court has already rejected the request to narrowly construe these statutes. This Court cannot resuscitate a statute that petitioners concede has some unconstitutional applications (Pet. Br. at 21, 45) by hoping that the Washington court might someday reconsider its interpretation of RCW 26.10.160(3).

This Court lacks jurisdiction to authoritatively construe state legislation. *Gooding v. Wilson*, 405 U.S. 518, 520 (1972). Federalism therefore requires that a federal court be loathe to invalidate a state statute "on a facial challenge based upon a worst-case analysis that may never occur." *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990). But this principle, relied upon so emphatically by petitioners, has no application where, as here, a state's highest court has accepted a challenge after finding that it cannot narrowly construe the statute to avoid constitutional infirmities. The Washington court's construction of RCW 26.10.160(3) is binding on this Court. *Eisenstadt v. Baird*, 405 U.S. 438, 442 (1972). The petitioners' attempt to offer a narrower interpretation of the statute as one giving grandparents special status to seek visitation after the death of a child thus must be rejected.

In any event, in considering the effect of these statutes the Washington court had before it the claim of not only biological

grandparents, but the claims of an ex-boyfriend and of an "aunt" by affiliation who had, by choice, visited with the child with whom she obtained court-ordered visitation only once in four years. Each of these parties below relied for their "rights" to seek visitation on the language of RCW 26.10.160(3) or former RCW 26.09.240. The three cases considered by the court below amply support a determination that these statutes preclude the application of a constitutionally sufficient rule of law in a "large fraction" of cases. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 895 (1992).

Petitioners have conceded that this statute can be unconstitutionally applied. They cannot complain in this Court of respondent's standing to challenge these statutes in the state's highest court.

B. Parents Have The Right To Raise Children Free Of State Interference.

The Washington Supreme Court's decision was compelled by the nature of the interest asserted by the parents who had been sued for visitation in the cases before it. The right to raise one's children free of state interference is the oldest of the personal liberties first identified and protected by this Court over 75 years ago. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). "The history and culture of Western civilization reflects a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Even as this Court has rejected attempts to expand the interests included within the liberties protected by the Constitution, it has singled out this right for special protection. *See Moore v. City of East Cleveland*, 431 U.S. 494, 501 n.8

(1977) (plurality opinion) (*Meyer* and *Pierce* survive, "while other substantive due process cases of the same era have been repudiated"); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Conn v. Gabbert*, __ U.S. __, 119 S. Ct. 1292, 1294 (1999).

The historical right to raise children free of state interference cannot be framed as the highly generalized and abstract issue of "grandparents' rights" proposed by the petitioners. Instead, the issue is whether the state may order visitation with "any person" "at any time," without proof that an indisputably fit custodial parent is not acting in her child's best interest, based on the standardless exercise of a judge's discretion. The common law would never have allowed such a thing. Families "formed the first natural society, among themselves. . ." 1 Blackstone, *Commentaries on the Laws of England* *47. At common law, the state did not interfere with the family. The family was viewed as an autonomous entity, existing under natural law separate and independent of the state. The state's ability to intervene in family matters was limited to protecting the parent-child relationship. 1 Blackstone, *Commentaries* at *453. Washington's statute conflicts with this longstanding tradition and the unanimous practice of the other states. *See* § D, *infra*.

This Court held that the liberties protected by the Due Process Clauses of the Fifth and Fourteenth Amendments encompass this right to bring up children free of state interference in the first significant family rights case, *Meyer v. Nebraska*, 262 U.S. 390 (1923). Relying on *Meyer*, the Court two years later struck down an Oregon statute requiring children to attend public schools as unduly interfering with the right of parents in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The *Pierce* Court first articulated the parental obligations that accompany the right to make decisions for children:

> The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

268 U.S. at 535.

The right to rear children free of unnecessary state interference thus is the most enduring of the substantive protections recognized by this Court. Though established during the height of the "Lochner era," *see Lochner v. New York*, 198 U.S. 45 (1905), these cases have remained as binding precedents and have been relied upon by succeeding generations, including the Warren Court, *e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Burger Court, *e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1971), and the Rehnquist Court, *e.g.*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). As this Court recently reiterated, "[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' . . . rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).

This Court has recognized that the right of parents to raise their children free of state interference is within the Constitution's protections of privacy, *e.g.*, *Griswold v. Connecticut*, 381 U.S. at 484; liberty, *e.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984); personal integrity, *e.g.*, *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); and association, *e.g.*, *Moore*, 431 U.S. at 505. Petitioners' attempt to limit *Yoder*, *Pierce* and *Meyer* as turning solely on the free-exercise clause of the First Amendment (Pet. Br. at 26) was rejected by this Court in *Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 881 (1990). And this Court in fact

recognized the First Amendment roots of the "intimate human relationships [that] must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme" in *Roberts v. Jaycees*, 468 U.S. at 617 (*citing Pierce* and *Meyer* at 618).

This Court has also rejected the attempt by petitioners and their amici to carve out from this fundamental right the supposedly "minor" substitution of a judge's decision with whom children should associate and when. The right to decide with whom one will associate is at the very core of the intimate family relationship that is afforded constitutional protection. *See Roberts v. Jaycees*, 468 U.S. at 619-20. Many of this Court's decisions have struck down restrictions less drastic than the termination of parental rights that petitioners assert is the only justification for invocation of the right to parental autonomy. (Pet. Br. at 26-27) *See, e.g.*, *Meyer*, *Pierce*, *Yoder* (educational decisions); *Moore* (living arrangements); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (visitation).

This personal liberty both encompasses and is limited to family members who share an intimate living relationship. It is "the emotional attachments that derive from the intimacy of daily association, and the role it plays in 'promot(ing) a way of life' through the instruction of children . . . as well as from the fact of blood relationship," that justifies respondent in asserting her rights to decide with whom and when her children will visit. *Smith v. Organization of Foster Families*, 431 U.S. 816, 841 n.22, 844 (1977), *quoting Wisconsin v. Yoder*, 406 U.S. at 231-33. For this reason, petitioners' reliance on *Michael H.* is misplaced. There it was the custodial mother and her husband, the putative father, who were entitled to assert the family autonomy right, not the biological father who sought visitation over the family's objection. *See also Quilloin v. Walcott*, 434 U.S. 246, 256 (1978) (rejecting claim of biological father who

had "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child" to allow adoption of a child by a stepfather who had acted as a parent).

Further, in asserting this right respondent acts not only for herself, but for her children. As this Court recognized in *Smith v. Foster Families*, "[c]hildren usually lack the capacity to make [the] decision [how to best protect their interests], and thus their interest is ordinarily represented in litigation by parents or guardians." 431 U.S. at 841 n.44. Unlike in *Smith*, where "the State, the natural parents, and the foster parents" all shared "some portion of the responsibility for guardianship" of children who had been placed in foster care, in this case there is no question as to the fitness of respondent, or as to her continuing responsibility as the children's mother. The children's interest is thus represented by her in this litigation:

> For centuries it has been a canon of the common law that parents speak for their minor children. So deeply imbedded in our traditions is this principle of law that the Constitution itself may compel a State to respect it.

Parham v. J.R. 442 U.S. 584, 621 (1979) (Stewart, J., concurring).

The fact that, when this litigation began, Tommie Granville Wynn was a single mother, and not acting on behalf of what is sometimes called an "intact" family, does not lessen her ability to assert the family's right. "The legal status of families has never been regarded as controlling." *Smith*, 431 U.S. at 845, n.53, *citing Stanley v. Illinois*, 405 U.S. at 651; *see also Moore v. City of East Cleveland*, 431 U.S. at 501-02. Indeed, granting children in an "intact" family the right to have their parents make childrearing decisions, while denying that right to children whose biological parents are not living together, would raise

other constitutional issues. *See Gomez v. Perez*, 409 U.S. 535 (1973). Nor can such a distinction be supported by sociological or other policy considerations:

> A child's need for continuity requires the state to recognize that a new family has been established the moment it has determined who shall be custodial parent. The new family deserves, therefore, to be as free of state intervention as any other "intact" family.

Goldstein, Solnit and Freud, *The Best Interests Of The Child* 32 (rev. ed. 1996).

The right to raise one's children without state interference is the most sacred and enduring of our personal liberties. It is invoked not only on behalf of the individual, but in stewardship of the life of a child with whom the parent shares the intimacies of daily life. This privileged right is not to be taken away and given to the state at the whim of a grieving relative or any other person who files a lawsuit invoking the coercive power of the state to impose a different view of a child's "best interest."

C. An Undefined And Standardless "Best Interest" Test Does Not Reflect A Compelling State Interest That Can Justify Overriding A Fit Parent's Childrearing Decisions.

The state may not interfere with the way in which parents raise their children without a compelling state interest. *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion). The government may not infringe "'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), *quoting Reno v. Flores*, 507 U.S. 292, 302 (1993) (emphasis in original). The statutory recital that state

action "may serve the best interest of the child," does not satisfy this exacting standard. The statutes at issue do not properly invoke the state's *parens patriae* power, which has always required a showing of parental unfitness or other evidence of harm to the child.

This Court in *Stanley v. Illinois*, 405 U.S. 645 (1977) rejected a state's reliance on "best interest" as "the only relevant consideration in determining the propriety of governmental intervention in the raising of children." 405 U.S. at 653 n.5. The state advances the best interest of the child by giving "full recognition to a family unit already in existence." *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978). The best interest of the child standard thus is properly used to decide unavoidable disputes between parents, but not between a custodial parent and the state, or between a custodial parent and a third party who invokes the power of the state to seek court-ordered visitation.

Enunciation of the "best interest" standard in legal disputes over children is a relatively recent phenomenon. Consistent with its common law tradition, pre-revolutionary Anglo-American law vested in fathers the right to custody of their minor legitimate children, who were viewed as an asset of the father's estate. Grossberg, *Governing The Hearth* 235 (1985). This view prevailed until the early 19th century, when state courts began to temper the primacy of paternal property rights with concern for child nurture and acceptance of women as distinct legal individuals. *See, e.g., Prather v. Prather*, 4 Des. 33 (S.C. 1809); *Commonwealth of Pennsylvania v. Addicks*, 5 Binn. 520 (Pa. 1813).

With the door open to competing custody claims of mothers and fathers, courts began to use their equitable discretion to select a custodial parent. Chancellor Kent recognized the primacy of paternal rights, but noted that the father's rights

could be disregarded depending on the particular "nature of the case." Kent, *2 Commentaries on American Law* *194-95. Justice Story similarly espoused a case-by-case examination of the relative fitness of each parent. Story, *2 Equity Jurisprudence* *596-97. By the late 19th century, state legislation had preempted the common law rights of the father, putting the parents on equal ground and leaving "the question of custody to the unrestrained judicial discretion." *2 Bishop on Marriage and Divorce* § 532 at 457 (6th Ed. 1881). During the 20th century, state legislation often adopted the "best interest of the child" standard to enable judges to make a fair and equitable custody decision between a child's parents. *See, e.g.*, former RCW 26.09.190. (RA 3)[7]

Petitioners' argument that respondent asserts a right that would preclude the use of the "best interest" test in disputes between parents thus is a particularly disreputable straw man. (Pet. Br. at 35-36 n.48) In Washington, as in other states, it may be that the best interest of the child standard "is properly applied between parents, *In re Marriage of Croley*, 91 Wn.2d

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[7] Washington state came late to statutory use of the standard, and abandoned it after just 14 years. An 1879 territorial act provided that "The rights and responsibilities of the parents in the absence of misconduct shall be equal . . ." Former RCW 26.16.125. (RA 1) In the next significant revision of domestic relations legislation, the 1949 Divorce Act provided that the court "shall make provisions . . . for the custody, support and education of the minor children of the marriage . . ." Former RCW 26.08.110. (RA 2) The 1973 Dissolution Act was the first to codify the "best interest" standard, listing five criteria for determining the court's consideration and expressly providing that conduct of a parent that did not affect the welfare of the child was not to be considered. Former RCW 26.09.190. (RA 3) The 1987 Parenting Act lists independent criteria for allocating residential time and decision-making but does not recite the best interest standard, at least in part because of criticism that former RCW 26.09.190 had offered "inadequate guidance to courts and parties." 1987 Proposed Parenting Act, Commentary and Text, at 9. (RA 25)

288, 588 P.2d 738 (1978), but between a parent and a nonparent, application of a more stringent balancing test is required . . ." *Marriage of Allen*, 28 Wn. App. 637, 626 P.2d 16, 21 (1981). Equally specious is petitioners' claim that recognizing respondent's parental rights would have prevented Brad Troxel from taking the children to visit his parents. (Pet. Br. at 47) Had such a dispute arisen, it would have been between the children's parents and resolved pursuant to the Washington Parenting Act. *See* Fact § A.1, *supra* at 2-3.

This Court has also recognized "best interests," "a venerable phrase familiar from divorce proceedings," as "a proper and feasible criterion for making the decision as to which of two parents will be accorded custody." *Reno v. Flores*, 507 U.S. 292, 303-04 (1993). But this Court rejected use of "best interests" as the criterion "for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others." *Flores*, 507 U.S. at 304 (denying challenge to an INS regulation permitting release of detained juvenile aliens in most instances only to parents, close relatives, or legal guardians).

The state's interest in securing a child's best interest based on some neutral standard is properly asserted in the case of parental separation because a child's parents, both of whom are in the process of forming new autonomous families, cannot agree. But only when parents turn to the courts to resolve their parenting disputes do they open up "the private realm of family life" to state interference. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). Even where other competing fundamental interests are at stake, use of a best interest test contrary to a parent's "informed and reasonable decision . . .is fundamentally at odds with privacy interests underlying the constitutional protection afforded" a parent's decisionmaking. *Bellotti v. Baird*, 443 U.S. 622, 656 (1979) (Stevens, J., concurring).

A best interest standard that gives no deference to a fit parent's decisionmaking fails to meet the compelling state interest test. Best interest is inherently indeterminative, both because society lacks the tools to make intelligent predictions about the future - an implicit feature of intervention in childrearing decisions - and because there is no single set of social values to be used in making the decision. Mnookin, *Child-Custody Adjudication: Judicial Function in the Face of Indeterminacy*, 39 Law & Contemp. Probs. 226, 257 (Summer 1975). At base, best interest "is not properly a standard. Instead, it is a rationalization by decision-makers justifying their judgments about a child's future, like an empty vessel into which adult perceptions and prejudices are poured." Rodham, *Children Under the Law*, 43 Harv. Ed. Rev. 487, 513 (1973).

Nothing in the legislative history suggests what state interest the Washington legislature intended to serve in enacting these statutes. The state Attorney General as amicus has invoked the state's *parens patriae* power as justification for third party visitation statutes. (Wash. Ami. at 17) But the *parens patriae* power has consistently been invoked only to prevent harm to a child. The first substantive reference to the doctrine in this Court was in *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944), where this Court confirmed that the use of the state's *parens patriae* power is appropriate to protect a child from harm. And both the majority and the dissent recognized that the state's power to invoke *parens patriae* arises only with a finding of parental unfitness or of harm to the child in *Santosky v. Kramer*, 455 U.S. 745, 760 (Opinion of the Court), 788 n.13 (Rehnquist, J. dissenting) (1982).

Until the 19th century, state intervention in the family was unknown. *See* Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 Geo. L.J. 887, 898-900 (1975). The state invoked its *parens patriae* power first to protect the public from poor and

delinquent children, and only later to protect children from physical, and later, emotional abuse. Rendleman, *Parens Patriae: From Chancery To The Juvenile Court*, 23 S. Car. L. Rev. 205, 218-19, 226-29 (1971); Areen, 63 Geo. L. J. at 899-911. Each state adopted statutes defining child neglect and authorizing judicial action to protect neglected children. Wald, *State Intervention on Behalf of Neglected Children: A Search for Realistic Standards*, 27 Stan. L. Rev. 985, 988 n.15 (1975). But even as state intervention to "protect" children became accepted practice, the integrity of the family remained a dominant state interest. Pound, *Individual Interests in the Domestic Relations*, 14 Mich. L. Rev. 177, 186 (1916) ("[I]t remains true that the social interest in the family as a social institution requires the law to proceed with great caution in securing the interests of children against their parents.").

Consistent with this historical precedent, Washington has invoked its *parens patriae* power only "when parental actions or decisions seriously conflict with the physical or mental health of the child." *In re Sumey*, 94 Wn.2d 757, 621 P.2d 108, 110 (1980). In *Sumey*, the Washington Supreme Court approved a temporary removal of a child from the family home that was intended in the end to strengthen the family unit. This situation is drastically different than that in third-party visitation disputes. There the dispute is between the parents and a third party whose goal in seeking visitation is to override the parent's childrearing decisions, rather than between the parents and the child.

Unfitness has been the trigger for state interference in parental decisionmaking in Washington state since the *parens patriae* power in matters of child custody was first recognized in *Russner v. McMillan*, 37 Wash. 416, 79 Pac. 988 (1905). Fit parents owe state officials no explanation for their childrearing choices, so long as they are not endangering their children. For instance, parents are free to choose the kind of education to

provide, even though state officials may be troubled that the parental choice will not advance the child's best interest. *Meyer v. Nebraska*, 262 U.S. 390, 402-03 (1923). Parents are free to make, or refuse to make, medical decisions for their children, even though medical providers may be troubled that the parental choice will not advance the child's best interest. *In re Hudson*, 13 Wn.2d 673, 126 P.2d 765, 778, 783 (1942). Parents are free to make both the very large and the very small childrearing decisions free from the obligation to explain themselves in a court of law.

As the Washington Supreme Court held, the Washington statutes at issue here are not a proper exercise of the state's *parens patriae* power. When the only thing the state can say as justification for overriding parental decisions concerning when and with whom their children should visit is that it "*may* serve the best interest of the child," the state has failed by its own logic to demonstrate a compelling ground for intervention. There must be a significantly stronger showing, and a legislative response narrowly tailored to meet it, before the state's power may be brought to bear in disputes in which parents are not the only litigants.

D. Washington's Third Party Visitation Statutes Are Not Narrowly Tailored To Serve A Compelling State Interest.

The *parens patriae* power is often invoked to justify state action of questionable constitutionality: The "exercise of the power of the state as *parens patriae* [is] not unlimited. . . . '[T]he admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness.'" *In re Gault*, 387 U.S. 1, 30 (1967), *quoting Kent v. United States*, 383 U.S. 541, 555 (1966). This Court therefore has rejected judicial deference to the operation of enactments that allow "intrusive regulation of family:"

> [W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.

Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion). A party invoking the state's power must produce evidence that the burden on the exercise of a fundamental right is connected to sound policy. *Carey v. Population Services, Intern.*, 431 U.S. 678, 696 (1977) (plurality opinion).

Petitioners fail to explain how the Washington statute at issue here is crafted to serve any compelling interest. RCW 26.10.160(3) is in fact far broader than the visitation statutes enacted in each of the other states whose case law petitioners cite. As the Washington Supreme Court recognized, this statute fails a constitutional challenge first because it allows "any person" to petition a court for visitation, second because it allows such an action "at any time," and third because the court may order visitation whenever it "may serve the best interest of the child," with no criteria for establishing, nor presumption that a parent will act in, the child's "best interest." These deficiencies will be examined in turn:

The Washington statute allows "any person" to petition the court for visitation. Among the states, only Alaska and Connecticut afford to "any person" the right to seek visitation with a child.[8] In most states, the right to seek visitation is either

[8] ALASKA STAT. §25.24.150; CONN. GEN. STAT. §46b-59. Alaska only allows a non-parent to intervene in pending custody proceedings. Connecticut has imposed significant restrictions by requiring the individual seeking visitation to prove that there has been a disruption in the child's (continued...)

limited to grandparents or other carefully limited categories of relatives, such as great-grandparents[9] or siblings, [10] or to individuals who have acted as a parent to the child[11] or who can demonstrate some other significant relationship.[12]

The Washington statute allows "any person" to seek visitation "at any time." Only seven states, each authorizing visitation actions only by grandparents or great-grandparents, do not limit when a court can order visitation.[13] Many of the other states, like Washington under current RCW 26.09.240, allow a visitation petition when a divorce or other action has

[8](...continued)
life sufficient to justify state intrusion in order to avoid constitutional problems with its statute. *Castagno v. Wholean*, 684 A.2d 1181, 1189 (Conn. 1996).

[9] ARIZ. REV. STAT. §25-409; ARK. CODE ANN. §9-13-103; CAL. FAM. CODE §3102; IDAHO CODE §32-719; ILL. REV. STAT. ch. 750, ¶5/607; IOWA CODE §598.35; MINN. STAT. §257.022; NEV. REV. STAT. §125A.330; N.J. STAT. ANN. §9:2-7.1; 23 PA.C.S.A. §5311.

[10] ILL. REV. STAT. ch. 750, ¶5/607, ch. 755, ¶5/11-7.1; LA. CIV. CODE art. 9:344; NEV. REV. STAT. §125A.330; N.J. STAT. ANN. §9:2-7.1.

[11] CAL. FAM. CODE §3101 (stepparent); MINN. STAT. §257.022 (child lived in household); WIS. STAT. §880.155 (stepparent). *See* American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* §2.04 (Tentative Draft No. 3 1998) ("de facto parent").

[12] *See* VA. CODE ANN. § 20-124.1 ("person with legitimate interest"); CAL. FAM. CODE §3100 ("any other person having an interest in the welfare of the child"); OHIO REV. CODE §3109.051(B)(1)(b) ("other person [with] an interest in the welfare of the child"). This is also the approach of current RCW 26.09.240, which allows a person who can prove a significant relationship by clear and convincing evidence to seek visitation if parenting proceedings are pending between the parents.

[13] HAW. REV. STAT. §571-46.3; IDAHO CODE §32-719; KAN STAT. ANN. §38-129; MD. CODE ANN. FAM. LAW §9-102; OKLA STAT. tit. 10, §5; W. VA. CODE §48-2B-4(b); WYO. STAT. §20-7-101.

put custody of a child at issue.[14] Alternatively, the grandparent must demonstrate that access to the child has been unreasonably or for some express period of time denied.[15]

Petitioners and many of the amici treat this case as though it arose under a statute providing for grandparent visitation after the death of the grandparent's child. The Court would itself be drafting a "grandparent visitation" statute for Washington were it to rely on petitioners' assertion that a statute providing for visitation with grandparents after a parent's death would pass constitutional muster. But Washington state has refused to grant special visitation rights to grandparents on at least three occasions. *See* Fact § A.2, *supra* at 5-6. Washington has not determined when any narrow category of non-parents, much less grandparents, should as a matter of state policy be able to seek court-ordered visitation outside a pending parenting proceeding. Further, the Washington courts have expressly rejected petitioners' proposition that a grandparent can assert some "derivative" right to visitation based on the parent's

[14] ALA. CODE §30-3-4; ALASKA STAT §25.24.150; ARIZ. REV. STAT. §25.409; ARK. CODE ANN. §9-13-103; CAL. FAM. CODE §§3021, 3100; COLO. REV. STAT. §19-1-117; IND. CODE §31-17-5-1; IOWA CODE §598.35; MASS. GEN. L. ch. 119; §39D; MICH. COMP. LAWS ANN. §25.312 (7b); MINN. STAT. §257.022; MISS. CODE ANN. §93-16-3; MO. REV. STAT. §452.402; NEB. REV. STAT. §43-1802; NEV. REV. STAT. §125A.330; N.J. STAT. ANN. §9:2-7.1; N.M. STAT. ANN. §40-9-2; N.C. GEN. STAT. §50-13.2; 23 PA.C.S.A. §5312; TEX. FAM. CODE ANN. §153.433; VT. STAT. ANN. ti.18, §1011.

[15] ALA. CODE §30-3-4; MO. REV. STAT. §452.402; N.M. STAT. ANN. §40-9-2; OR. REV. STAT. §109.121; R.I. GEN. LAWS §15-5-24.3; UTAH CODE ANN. §30-5-2.

relationship with the child before death. (Pet. Br. at 47-48)[16] *Custody of Thompson*, 34 Wn. App. 643, 663 P.2d 164 (1983).

Petitioners therefore cannot assert that RCW 26.10.160(3) furthers the state's interest in insuring visitation after the death of the grandparents' child. In any event, in striking down these statutes the Washington Supreme Court had before it the claims not only of these petitioning grandparents, who had never been denied access to their grandchildren, but of an ex-boyfriend who waited 18 months before seeking visitation, and of siblings of another custodial mother's deceased husband who filed their action barely a month after his death.

Petitioners and amici also treat this case as though it arose under a statute that places the burden to prove that court-ordered visitation is in a child's best interest on the party seeking visitation.[17] But the Washington statute itself authorizes the court to order visitation whenever the court believes it "may serve the best interest of the child." It imposes no burden on the third party seeking visitation. Petitioners' assertion that the *respondent* must prove that the orders entered place an "undue burden on the exercise of a fundamental right" in fact would place the burden on a fit parent. *See* § E.1, *infra*

[16] Petitioners' suggestion that their son's right to residential time could somehow be "willed" to them (Pet. Br. at 47) is particularly feudal. In the 17th century, a mother had no legal rights to custody after her husband's death; the father could will custody of his children to a guardian. Mason, *From Father's Property To Children's Rights* 19 (1994).

[17] Contrary to the assertion of petitioners and of amici AARP and Grandparents United for Children's Rights, the states are not uniform in their use of the "best interest" test for grandparent visitation. The statutes of Alabama, New Mexico, North Carolina, and Rhode Island (when visitation is sought after a parent's death) do not recite the "best interest" mantra as the basis for an award of visitation. ALA. CODE §30-3-4; N.M. STAT. ANN. §40-9-2; N.C. GEN. STAT. §50-13.2; R.I. GEN. LAWS §15-5-24.1.

at 40-44. And the Washington Supreme Court had before it visitation orders that did not purport to place the burden on the parties seeking visitation, but simply substituted the court's opinion of what "may serve the best interest of the child" for that of these children's admittedly fit mothers.

Petitioners cite cases from seven jurisdictions other than Washington state for the proposition that the petitioners met some "burden of persuasion" that court-ordered visitation was in the best interest of their grandchildren. (Pet. Br. at 11, n.23) Each of these states,[18] and many others,[19] place the burden on the person seeking visitation to prove that visitation is in the child's best interest. In many states, as is now true in Washington under RCW 26.09.240 when third party visitation

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[18] *Rosemary E.R.. v. Michael G.Q.*, 471 A.2d 995, 997 (Del. 1984); *Sightes v. Barker*, 684 N.E.2d 224, 230 (Ind. App. 1997); *Wolinski v. Browneller*, 693 A 2d 30, 41-42 (Md. 1997); N.J. STAT. ANN. §9:2-7.1; *Ridenour v. Ridenour*, 901 P.2d 770, 775 (N.M. Ct. App. 1995); *Norris v. Tearney*, 619 A.2d 339, 340 (Pa. Super. 1993); UTAH CODE ANN. § 30-5-2 ("clear and convincing evidence").

[19] GA. CODE ANN. §19-7-3 (*but see* n.23, *infra*); IDAHO CODE §32-719; *West v. West*, 689 N.E.2d 1215, 1221 (Ill. App. 1998) (statute constitutional because of burden); *Weybright v. Puckett*, 635 N.E.2d 119, 121 (Ill. App. 1994); *Santiello v. Santiello*, 850 P.2d 269, 271 (Kan. App. 1992); NEB. REV. STAT. §43-1802 ("clear and convincing evidence"); *Steward v. Steward*, 890 P.2d 777, 782 (Nev. 1995) ("clear and convincing evidence"); *O'Brien v. O'Brien*, 684 A.2d 1352, 1354 (N.H. 1996); *Kerns v. Southern*, 397 S.E.2d 651, 652 (N.C. App. 1990); *Tope v. Kaminski*, 793 S.W.2d 315, 317 (Tex. App. 1990) (must show "parental abuse or neglect"); VA. CODE ANN. §20-124.2 ("clear and convincing evidence"); W. VA. CODE §48-2B-7. Judicial imposition of such a burden was relied upon in the intermediate appellate courts to insure constitutional application of the Tennessee statute until Tennessee's highest court declared the statute unconstitutional under that state's constitution in *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993). And in each of these states, and in those listed in note 18, visitation is limited to grandparents or great-grandparents.

is requested during proceedings between the parents, express criteria guide the court's exercise of its discretion in determining the child's "best interest."[20]

Such narrowly tailored safeguards are absent from the statutes considered by the court below. And because Washington assiduously eliminated any presumption between the parents as to where the best interest of a child lay after enactment of former RCW 26.09.190,[21] there is no reason to believe that any Washington court would presume that a parent is acting in a child's best interest in disputes between parents and third parties.

The Washington statute does not properly reflect "the traditional presumption that the parents act in the best interests of the child . . ." *Parham v. J.R.*, 442 U.S. 584, 604 (1979). Indeed, state interference with a parent's childrearing decision might well require a heightened burden of proof.[22] "This Court

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[20] ALASKA STAT. §25.24.150; ARIZ. REV. STAT. §25-409; *Baker v. Perkins*, 774 S.W.2d 129 (Ky. Ct. App. 1989); ME. STAT. ANN. §1803; *Fairbanks v. McCarter*, 622 A.2d 121 (Md. 1993); *Martin v. Coop*, 693 So.2d 912 (Miss. 1997); NEV. REV. STAT. §125A.330; N.J. STAT. ANN. §9:2-7.1; N.M. STAT. ANN. §40-9-2; OHIO REV. CODE §3109.051(D); OKLA STAT. tit. 10, §5; UTAH CODE ANN. §30-5-2; VA. CODE ANN. § 20-124.3; W. VA. CODE §48-2B-5(b).

[21] Any "tender years" presumption that young children should be placed with their mother was formally rejected in *Marriage of Murray*, 28 Wn. App. 187, 622 P.2d 1288, 1290-91 (1981) and *Marriage of Janovich*, 30 Wn. App. 169, 632 P.2d 889, 891 (1981). A presumption that permanently placing children with the parent who acted as primary caregiver during the pendency of a dissolution action would best serve their interests was rejected in *Marriage of Kovacs*, 121 Wn.2d 795, 854 P.2d 629 (1993).

[22] *See, e.g.*, GA. CODE ANN. §19-7-3; RCW 26.09.240 ("clear and convincing evidence" of "significant relationship"); *Wolinski v.*

(continued...)

has mandated an intermediate standard of proof - 'clear and convincing evidence' - when the individual interests at stake in a state proceeding are both 'particularly more important' and 'more substantial than mere loss of money.'" *Santosky v. Kramer*, 455 U.S. 745, 756 (1982), *quoting Addington v. Texas*, 441 U.S. 418, 424 (1979). An enhanced standard of proof is necessary where protected liberty interests are at stake, "to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington v. Texas*, 441 U.S. at 423. *See Cruzan v. Missouri Dept. of Health*, 497 U.S. 261, 282-83 (1990).

A best interest standard, bereft of any criteria that will protect a parent's interest in autonomous decisionmaking, is not narrowly tailored to meet any compelling state interest. *See In re Gault*, 387 U.S. 1, 18 (1967) ("unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure"). The best interest standard "provides little real guidance to the judge and his decision must necessarily reflect personal and societal values and mores. . . ." *Bellotti v. Baird*, 443 U.S. 622, 655 (1979) (Stevens, J., concurring). The substantive right to parental autonomy necessarily includes protection from state action that allows infringement of that right in an arbitrary and standardless manner. *See Giaccio v. State of Pennsylvania*, 382 U.S. 399, 402 (1966) (state law allowing jury to assess costs against acquitted criminal

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[22](...continued)
Browneller, 693 A.2d 30 (Md. 1997) (parent's decision "detrimental"); NEB. REV. STAT. §43-1802 ("clear and convincing evidence"); *Steward v. Steward*, 890 P.2d 777, 782 (Nev. 1995) ("clear and convincing evidence"); R.I. GEN. LAWS §15-5-24.1 ("clear and convincing evidence" parent's decision unreasonable); *Tope v. Kaminski*, 793 S.W.2d 315, 317 (Tex. App. 1990) (must show "parental abuse or neglect"); UTAH CODE ANN. §30-5-2 ("clear and convincing evidence"); VA. CODE ANN. §20-124.2 ("clear and convincing evidence").

defendant "invalid under due process clause because of vagueness and the absence of any standards . . .").

Respondent does not contend that the states are constitutionally barred from ever granting grandparents, or others who can establish a significant relationship with a child, the right to court-ordered visitation. Indeed, some of the third party visitation statutes adopted and interpreted by the various states protect parental rights - through standing requirements, presumptions, burdens of proof, and recital of specific factors that require a court to consider family autonomy in defining a child's best interest. But the fact that some of the states' experiments may have been successful does not mean that Washington's has been.[23] Because Washington's third party visitation statutes are not narrowly tailored to serve the state's *parens patriae* power, the Washington Supreme Court was justified in striking down the statutes.

E. The "Undue Burden" Test Is Not Appropriately Applied To This Direct Infringement On A Protected Family Right On Behalf Of Third Parties Who Can Assert No Fundamental Interest In Visitation With A Child.

This Court has steadfastly reviewed state action directly infringing on fundamental rights under a constitutional standard of strict scrutiny. *Washington v. Glucksberg*, 521 U.S. 702, 721 n.17 (1997) ("[W]e have never abandoned our

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[23] The Washington Supreme Court is by no means alone in striking down its state's third party visitation statute on constitutional grounds. *See, e.g., Hoff v. Berg*, 595 N.W.2d 285 (N.D. 1999); *Williams v. Williams*, 485 S.E.2d 651 (Va. App. 1997); *Beagle v. Beagle*, 678 So.2d 1271 (Fla. 1996); *Simmons v. Simmons*, 900 S.W.2d 682 (Tenn. 1995); *Brooks v. Parkerson*, 454 S.E.2d 769 (Ga.), *cert. denied*, 516 U.S. 942 (1995).

fundamental-rights-based analytical method"), *citing Reno v. Flores*, 507 U.S. 292, 301-305 (1993). The "significant impairment" test suggested by the petitioners may be appropriate where the Court is faced with balancing a fundamental right against an equally compelling governmental interest, or where the challenged state action is facially neutral and only indirectly burdens a protected liberty interest. But such a balancing test must be rejected where, as here, court-ordered visitation directly infringes on parental autonomy and there is no constitutionally protected right or compelling state interest in third party, or even grandparent, visitation. Even were the Court to adopt petitioners' balancing test, the burden of litigation itself and the micro-management of the family lives of custodial parents, enforced by the state's coercive and punitive contempt power, constitute a "significant impairment" of respondent's right to parental autonomy.

1. The "Undue Burden" Standard Does Not Apply To State Legislation Directly Infringing On A Fundamental Right Unless Supported By An Equally Compelling Interest.

Petitioners do not dispute that respondent has a fundamental right to parental decisionmaking free of state interference. Instead, contrary to this Court's recent pronouncements in *Glucksberg* and *Flores*, they contend that the validity of the governmental action "turns in part on the magnitude of its impact" (Pet Br. at 22) on the protected right.

The Court has referred to a "substantial infringement" or "undue burden" standard only where a fundamental right must be balanced against an equally fundamental and compelling state interest. For instance, in abortion cases the state has a vital and compelling "interest in protecting the life of the unborn," *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 873 (1992) (plurality opinion), and "the undue

burden standard is the appropriate means of reconciling the State's interest [in life] with the woman's constitutionally protected liberty." 505 U.S. at 876. Similarly, the Court weighed a patient's right to refuse medical treatment against the state's equally compelling interest in safeguarding an individual's personal choice between life and death in *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 281-82 (1990).

Legislation that attempts to balance two equally compelling or fundamental interests is thus treated differently than state action directly restricting a fundamental right. Petitioners' analogy to parents asserting "a constitutional right to control the curriculum taught to their children in public schools" (Pet. Br. at 29) fails precisely because it ignores this distinction. The state undoubtedly has a compelling interest in providing its citizens with an education sufficient to "'prepare pupils for citizenship in the Republic.'" *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986). But it may not compel a parent to send his or her child to public school against the parent's wishes. *Runyon v. McCrary*, 427 U.S. 160, 178 (1976). Thus, although the parents' privacy and free exercise rights were unquestionably affected by school officials' curriculum choices in *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1065, 1072-73 (6th Cir. 1987) (en banc) (discussed in Pet. Br. at 29), the parents were not compelled to expose their children to a curriculum they found offensive. Indeed, the parents in *Mozert* exercised their prerogative to home school their children, or to send them to religious schools. 827 F.2d at 1060.

Petitioners attempt to extend the constitutional right to privacy in "family" decisions to include grandparents and other collateral relatives who do not act as custodial or psychological parent. (Pet. Br. at 39-46) But there is no historical precedent for extending the right to family autonomy to non-custodial grandparents. At common law, third parties, including

grandparents, had no right to seek court-ordered visitation against the wishes of parents. *Succession of Reis*, 15 So. 151, 152 (La. 1894); *see generally, Annot., Visitation Rights of Person Other Than Natural or Adoptive Parents*, 98 A.L.R.2d 325 (1964). Indeed, given typical life expectancies, most children never knew their grandparents. Cherlin and Furstenberg, *The New American Grandparent* 24-26 (1992). The constitutional protection accorded the sanctity of the family relationship is limited to those that exist between parent and child, *Meyer v. Nebraska*, 262 U.S. 390 (1923), or the functional equivalent of parent and child, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), who share "the intimacy of daily association." *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977). Judicial reluctance to compel third party visitation was consistent with the common law's respect for parental autonomy.

This limitation of the privacy right to those living in intimate association means, as petitioners tacitly recognize, that they have no special right simply because of their biological connection to Natalie and Isabelle:[24]

> To suggest that the biological fact of common ancestry necessarily gives related persons constitutional rights of association superior to those of unrelated persons is to misunderstand the nature of the associated freedoms that the Constitution has been understood to protect.

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[24] Petitioners strongly relied on this biological tie below in discounting respondent's explanation that she had to balance the interests of five sets of grandparents in the Wynns' extended family: "[T]here are only two (birth) grandmothers and grandfathers. (Mrs. Winn's [sic] father is not in the picture, as I understand it.). The other 'grandparents' may be step-grandparents, Mr. Winn's [sic] parents." (CP 3)

Moore, 431 U.S. at 535 (Stewart, J., dissenting). "The State has no more interest in requiring all family members to talk with one another than it has in requiring certain of them to live together . . . [M]aking the 'private realm of family life' conform to some state-designed ideal, is not a legitimate state interest at all." *Hodgson v. Minnesota*, 497 U.S. 417, 452 (1990) (*citing Moore* and *Meyer*). As the petitioners' asserted "right" to third party visitation has no constitutional component, there are no competing interests justifying the "undue burden" standard of review here as there were in *Casey*.

The *Casey* plurality also found support for its "undue burden" standard in caselaw addressing challenges to facially neutral state laws that have only an indirect effect on a protected constitutional interest. 505 U.S. at 873 ("not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right."). In *Lyng v. Castillo*, 477 U.S. 635 (1986) (discussed in Pet. Br. at 23), a challenged food stamp regulation treated parents, children, and siblings who live together as a single household, but did not treat as a single household more distant relatives, or groups of unrelated persons, who live together. The regulation undoubtedly *affected* the family rights of parents, children and siblings by reducing the benefits of needy families and their young children. 477 U.S. at 636. But it did not "'*directly* and *substantially*' interfere with family living arrangements and thereby burden a fundamental right." 477 U.S. at 638 (emphasis added). *See also Maher v. Roe*, 432 U.S. 464, 477 n.10 (1977) (discussing "distinction between direct state interference with a protected activity and state encouragement of an alternative activity . . .").

By contrast, where state action imposes immediate and direct restrictions on family autonomy there is no issue of weighing the respective interests: the challenged restriction is subjected to heightened constitutional scrutiny because it "intrudes on choices concerning family living arrangements."

Moore v. City of East Cleveland, 431 U.S. at 499. Because the city ordinance at issue in *Moore* expressly prohibited cousins from living with their grandmother, the plurality noted that its infringement of protected family autonomy was "*no mere incidental* result of the ordinance." 431 U.S. at 498 (emphasis added). This Court's decisions concerning other fundamental rights similarly distinguish between direct and indirect infringements. Thus, a Social Security regulation that terminated a dependent child's benefits upon marriage did not "interfere with an individual's freedom to make a decision as important as marriage," *Califano v. Jobst*, 434 U.S. 47, 54 (1977), but a state law that prohibited any resident delinquent in child support payments from marrying did. *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978).

Grandparents have many means by which to attempt to influence family decisions. It does not denigrate them, or their place in a family, to recognize that the state may not authorize them to commence a lawsuit that the state itself may not bring. Grandparents are part of the "private realm of the family" that the state may not enter without a compelling state interest. When they sue other family members they invoke the power of the state in a manner that directly burdens the family's right to autonomy.

The Washington statutes at issue here are not facially neutral laws that only indirectly interfere with a parent's childrearing decisions. Instead, they operate directly and with the apparent purpose of vetoing a fit parent's otherwise autonomous decision regarding with whom her child will associate and on what terms. Such laws are traditionally subject to strict scrutiny. Their constitutional validity should not be measured by a relativistic balancing test, especially in the absence of a fundamental countervailing governmental interest equal to the state's interest in protecting human life.

2. The Court Orders Considered By The Court Below "Significantly Impair" The Constitutional Right To Family Autonomy.

Even if this Court adopts an "undue burden" standard for analyzing the constitutional validity of court-ordered third party visitation, the proceedings reviewed by the court below substantially infringe parental rights. This case is not about access to grandchildren by grandparents, but about the power to authorize one person to sue another concerning family matters. Lawsuits, however civilly conducted, are ultimately backed by the power of the state to enjoin behavior. Petitioners ignore not only the economic and emotional costs of litigation, significant burdens in their own right, but also the consequences of disobedience - the potential for civil contempt and criminal prosecution.

This Court must reject petitioners' suggestion that the visitation order at issue in their case does not amount to a "substantial infringement" on respondent's parental autonomy because the Wynns were willing to voluntarily allow their children to visit their grandparents. As this Court's Fourth Amendment jurisprudence makes clear, there is a fundamental difference between voluntarily ceding one's personal autonomy and being compelled to do so by the coercive power of the state. *See Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990).

The economic cost of domestic relations litigation presents a formidable barrier to justice for many Americans. *See generally*, Spangenberg Group, *American Bar Ass'n National Civil Needs Survey: Final Report* (1989). Once the courthouse door is open to "any person" to seek court-ordered visitation "at any time," parents can literally spend their children's educational savings arguing with third parties over what is in their child's best interest. That cost is exacerbated in grandparent visitation litigation, where in most instances the

resources of an older, more financially secure individual are brought to bear against a younger parent who has the costs and responsibilities of childrearing.[25]

The emotional cost of litigation, let alone court-ordered visitation, is no less significant. This Court recognized the "significant intrusion into the parent-child relationship" inherent in adversarial hearings in *Parham*, noting that "[a] confrontation over such intimate family relationships would distress the normal adult parents and the impact on a disturbed child almost certainly would be significantly greater." *Parham v. J.R.*, 442 U.S. 584, 610 (1979). Imposing upon young children the burdens of litigation not only undermines their sense of wellbeing and security, but risks undermining their relationships with the very persons seeking visitation. Goldstein, Solnit and Freud, *The Best Interests Of The Child* 23-25 (rev. ed. 1996).

Third party visitation litigation also forces on a parent the cruel choice of either allowing unsupervised visitation with a person to whom she may have legitimate objections or exposing private family information in a public proceeding, with the serious danger of creating or exacerbating family rifts. Jenifer Troxel conceded at trial that this family's relationship was not normal *because* of this lawsuit, which she had commenced. (RP 57; JA 33a) It is unusual for parents to object to visits between their children and grandparents. When they do, there generally is a reason. Sometimes those reasons are embarrassing, and a "public airing" of them will only "complicate relations between the individuals involved," as petitioners also concede. (Pet. Br.

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[25] *Compare* the median net worth of married couples 55 to 64 years of age ($127,752) *with* female householders 35 years or younger ($1,342) - the respective categories relevant to these litigants when this action was commenced. U.S. Census Bureau, *Asset Ownership of Household: 1993 Highlights*, published June 1999 <http://www.census.gov/hhes/www/wealth/highlite.html> (RA 43-46)

at 6, n.10) A mother should not be put in the position of choosing between the welfare of her children and embarrassment to their grandparents.

As the cases before the Washington Supreme Court demonstrate, visitation orders also go far beyond simply instructing a parent when to make the child available for pickup and return. Tommie Granville Wynn was ordered to consult with the Troxels before discussing family matters with her children, and to notify them of her children's activities. A court decreed how her daughter Isabelle should be addressed. (CP 125, Pet. 77a) Kelly Stillwell was ordered to pay for a "visitation facilitator," and to write down her "parenting rules" for the Smiths' review - and, no doubt, criticism. (Smith CP 17-18) The more contested the proceeding, the more domestic minutiae visitation orders attempt to control. It is precisely this regulation of the "intimacies of daily life" that makes these orders so intrusive. These orders are even more offensive because they are usually unilateral - the parent, who has the continuing right and obligation to raise and support the child, is subjected to severe restrictions. But the individual who seeks and is awarded visitation has no obligation of support - or even to exercise the visitation that has been ordered.

This case graphically demonstrates the immense burden imposed on families by third party visitation actions. The Troxels' insistence on pursuing the litigation could destroy the Wynns' ability to insure that their children can afford to go to college. For this lawsuit was frivolous in the broadest sense of the word - because there was absolutely no need for it. The petitioners' claim embodies an attitude of entitlement that has no place in the domestic life of our society, or of this family. All the Troxels had to do was ask to visit, rather than demand visitation. But because they see "grandparent visitation" as a right, rather than the blessings of extended family life as a privilege, they have caused the Wynns enormous psychic and

economic cost defending the fundamental right of all families not to have the State micro-manage their affairs. By any measure of the consequences of litigation over issues that should be resolved in the heart, not the courts, the orders considered by the court below "significantly impair" the constitutional right to family autonomy.

F. The Washington Supreme Court's Choice Of Remedy Does Not Implicate Federal Law And Is Not A Matter For Review By This Court.

The Washington court properly struck down Washington's third party visitation statute as unconstitutional. Petitioners cannot complain of this choice of remedy. Their contention that the State's *parens patriae* power may properly be brought to bear in the particular facts and circumstances presented by their specific petition is essentially a request that this Court sever the constitutional applications of the statute from its unconstitutional applications. *See* Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 249-50 (1994). But the determination of a state's highest court that it cannot sever unconstitutional applications of a statute from those that pass constitutional muster is binding on this Court as a matter of federalism. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 521 n.26 (1981) ("Although the ordinance contains a severability clause, determining the meaning and application of that clause is properly the responsibility of the state courts.").

This Court cannot save the statute based on the possibility that petitioners' specific circumstances may be sufficient to overrule a parent's decision concerning visitation. The state court refused to sever permissible applications of the statute from those that interfere with a parent's fundamental rights. In striking down these statutes as unconstitutional, the Washington Supreme Court necessarily determined that a proper statute

would be significantly different than envisioned by the Legislature. *Compare In re Hendrickson*, 12 Wn.2d 600, 123 P.2d 322, 326 (1942) *with Guard v. Jackson*, 83 Wn. App. 325, 921 P.2d 544, 548 (1996), *aff'd*, 132 Wn.2d 660, 940 P.2d 642 (1997). This Court is not free to second guess that issue of state law, nor the remedy chosen by the state's highest court in light of its inability to sever constitutional from unconstitutional applications of the statute.

Nor is petitioners' insistence that the Washington courts be instructed to evaluate the constitutional validity of any third party's visitation request on a case-by-case basis sound as a matter of policy. Under petitioners' view, every visitation dispute will become a constitutional confrontation, as courts wrestle with the issue whether "in the particular circumstances at issue the [court's order] is unconstitutional" as an "undue burden" on parental rights. (Pet. Br. at 7) This Court cannot tell the Washington Supreme Court that it must make the state courts available to tease out defensible applications of this statute from those that cannot pass constitutional muster.

As construed by the state court, the Washington statutes are clear, unequivocal, and allow "any person" to petition for visitation "at any time." By ignoring this construction and limiting its review to these particular parties at this particular time, this Court would merely be trading overbreadth for vagueness, subjecting fit parents to litigation burdens which are themselves an infringement of parental autonomy:

> [A]n attempt to 'construe' the statute and to probe its recesses for some core of constitutionality would inject an element of vagueness into the statute's scope and application; the plain words would thus become uncertain in meaning only if courts proceeded on a case-by-case basis to separate out constitutional from unconstitutional areas of coverage. This course would

> not be proper, or desirable, in dealing with a section which so severely curtails personal liberty.

Aptheker v. Secretary of State, 378 U.S. 500, 516 (1964). *See* Tribe, *American Constitutional Law* § 12-29 (2nd ed. 1988).

This Court cannot dictate to the Washington Supreme Court the proper remedy when the state court was confronted with a statute that even petitioners concede can be unconstitutionally applied. And even if this Court disagrees and declines to approve the state court's remedy for violation of the federal constitution, it must remand for the state court's determination of the proper remedy under Article 1, Section 7 of the Washington State Constitution.

CONCLUSION

The founders of this country could not have imagined a legal system in which orders for visitation and family management such as those at issue here could be entered and enforced. They did not live in a society where such state control of the family would be tolerated. Neither do we. This Court must let stand the Washington Supreme Court's decision.

RESPECTFULLY SUBMITTED this 13th day of December, 1999.

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